Cable operators' failure to pursue litigation under Section 224 is hardly dispositive, as the individual cable operators' decisions not to litigate could have been motivated by any number of reasons, such as a lack of resources. The "Real Access Alliance" also argues that the deletion of H.R. 4103 (which would have mandated MTE access for cable operators) from the Cable Act of 1984 demonstrates that Congress did not intend -- twelve years later -- to give cable operators/telecommunications providers access to MTEs when it amended Section 224 in 1996.[157] However, Section 224 must be considered in the context of the 1996 Act, not the Cable Act of 1984. The pro-competitive goals of the 1996 Act provide the framework against which the Commission must interpret the terms of Section 224.[158] Thus, the term rights-of-way (left undefined by Congress) should be construed broadly, to include all rights-of-way, including rights-of-way and conduit within MTEs. In amending Section 224 in the 1996 Act, Congress intended that this provision would give telecommunications carriers access to those rights-of-way

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Comments, at 11. However, by its terms, Section 621(a)(2) is limited to "public" rights-of-way and "dedicated" easements, whereas Section 224 is not so limited.

157 See RAA Comments, at 41-42. Similarly, the "Real Access Alliance" argues that Congress' failure to pass S. 1822 in 1994 to mandate building access demonstrates that Congress did not intend to grant access to MTEs under Section 224 in 1996. Id. at 42. Why Congress deleted these provisions is not known. However, Congress could have believed that rights to access buildings were already embodied in Section 224.

By the same token, the introduction of S. 1301 on June 19, 1999, which would create a right of access to federal buildings, is not "an implicit recognition that such access is not provided for under Section 224." Florida Light & Power Co. Comments, at 10. Rather, it is simply evidence that Congress considers access to MTEs by telecommunications carriers an important issue.

158 United States Nat'l Bank of Ore. v. Independent Ins. Agents of America, Inc., 508 U.S. 439, 455 (1993)("[I]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.")(quoting United States v. Heirs of Boisdore, 49 U.S. 133, 122 (1849)).

that utilities gained through their monopoly positions as the sole providers of essential services, including rights-of-way inside MTEs.[159]

2. The Commission Must Define "Rights-Of-Way" To Include All Rights To Pass Over Or Occupy Property For Purposes Of Distributing Utility Service.

Commenters also assert that the Commission lacks the authority to address utilities' access rights in MTEs because such access rights are governed solely by state law.[160] They claim that utilities typically do not have the requisite authority to allow third party access to use their existing rights on or within MTEs, that the access authority does not permit uses different from existing uses on the premises, or that the permission of the underlying property owner is required.[161] They assert that utilities do not have access to rights-of-way within MTEs; rather, their rights are licenses, leases, and easements.[162] These objections are not consistent with the broad language of the statute and Congress' intent to open the last mile to competing telecommunications providers and new technologies.[163]

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159 See Joint Statement of the Managers, H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess., 113, at 117 (1996)("Section 101 of the conference agreement establishes a new Part II of title II of the Communications Act. Part II contains new sections 251-261 of the Communications Act to create competitive communications markets."); see also id. at 206 ("Section 105 of the House amendment is intended to remedy the inequity of charges for pole attachments among providers of telecommunications services.").

160 RAA Comments, at 53; American Electric Power Service Corp. et al., Comments, at 23; Florida Power & Light Co. Comments, at 7; UTC/EEI Comments, at 6.

161 American Electric Power Service Corp. et al., Comments, at 16; Ameritech Comments, at 3-4; RAA Comments, at 55-56; UTC/EEI Comments, at 5.

162 American Electric Power Service Corp. et al., Comments, at 17; RAA Comments, at 55; USTA Comments, at 9. But see Ameritech Comments, at 3, n. 8 ("[M]ost utility easements on private property are 'easements in gross,' that is, easements not appurtenant to a property owned by the utility.")

163 Congress sought "to provide for a pro-competitive, de-regulatory national policy framework" that would "accelerate rapidly private sector deployment of advanced

In implementing Section 224, the Commission should not be constrained by state law interpretations of the term rights-of-way. While it is true that "the access obligations of section 224(f) apply when, as a matter of state law, the utility owns or controls the right-of-way to the extent necessary to permit such access," the FCC is free to interpret the terms of Section 224, a federal statute, in order to effectuate Congressional intent.[164] WinStar agrees with Teligent that "[t]he Commission should define the scope of a utility right-of-way for purposes of Section 224 in such a manner as to permit use of such rights-of-way by competitive telecommunications carriers."[165] Because the statute does not define "rights-of-way," it is necessary and appropriate for the Commission to define rights-of-way for purposes of Section 224.

In order to effectuate Congressional intent, the Commission must interpret the term "rights-of-way," at a minimum, to include all rights-of-way held by utilities including those for access to rooftops, riser conduit, and other locations on private property, including MTE properties. A reasonable definition of rights-of-way will permit wireless CLECs, who need access to these locations in order to provide their services, to build out their networks swiftly and on a level playing field with the ILECs and wireline CLECs. A narrow definition, on the other hand, would diminish the prospect of competition by wireless CLECs because such CLECs will be

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telecommunications and information technologies and services to all Americans." Joint Statement of the Managers, H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess., 1 (1996). Full implementation of Section 224 is integral to this vision of the future.

164 Local Competition First Report & Order, at ¶ 1179.

165 Teligent Comments, at 28. Teligent notes that "[t]his definition need not otherwise alter State law." Id. Thus, "[s]tate law definitions of the scope of easements would remain unchanged, except in cases of applying the federal obligations of Section 224." Id. WinStar agrees.

unable to gain access to many buildings, or will only be able to gain access under unreasonable rates, terms, and conditions.[166]

Utilities claim (and building owners agree) that their private rights-of-way do not permit access or use by third parties, that their private rights-of-way do not permit uses different from existing uses, or that negotiation with, approval by, and compensation to the owner of the underlying fee is required before access may be granted. These arguments are contrary to the Commission's findings in the Local Competition First Report and Order. There, the Commission held that Section 224 contemplates that utilities will "exercise their powers of eminent domain to establish new rights-of-way for the benefit of third parties."[167] Hence, a utility will be "expected to exercise its eminent domain authority to expand an existing right-of-way over private property in order to accommodate a request for access, just as it would be required to modify its poles or conduits to permit attachments."[168] The Local Competition First Report and Order also suggests that rooftop rights-of-way must be made available insofar as the rights-of-way are a component of the utilities' distribution network.[169]

The utilities' restrictive interpretation of rights-of-way is contradicted by cases recognizing that statutorily designated third parties may lawfully access the rights-of-way owned or controlled by utilities without the need for negotiations with, approval of, and compensation to the owner of the servient property. As the Eleventh Circuit stated:

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166 See ALTS Comments, at 6-18 (reporting access problems from around the country).

167 Local Competition First Report and Order, at ¶ 1181.

168 Id.

169 Id. at ¶ 1185 ("The intent of Congress in section 224(f) was to permit cable operators and telecommunications carriers to 'piggyback' along distribution networks owned or controlled by utilities . . . .").

> Since most developers voluntarily grant easements for use by utilities . . . Congress may force the developer to allow a cable franchise to use the easement without offending the takings clause of the Constitution. Such "voluntary" action by developers may be an integral part of zoning procedures or the obtaining of necessary building permits. However obtained, once an easement is established for utilities it is well within the authority of Congress to include cable television as a user.[170]

In ruling on whether an electric utility's easement would allow a cable operator to gain access to a subdivision through use of such easement, the Fourth Circuit determined that:

> The fact that an additional wire would be introduced to the many others on the poles does not impose any meaningful increase of burden on [the servient estate's] interest in the underlying property. . . . Moreover, the electrical signals themselves provide no basis for distinction for purposes of measuring the increased burden on the servient estate. Any possible difference would be impalpable and would not impose an additional burden on the servient estate.[171]

Ultimately concluding that the cable operator could use the electric utility's easement over private property, the court noted that it was immaterial for easement purposes that the cable operator was not a telephone company, stating that "[t]he transmissions of a telephone company are virtually indistinguishable from transmissions of a non-telephone company transmitting television signals for purposes of a pole and wire easement grant."[172]

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170 Centel Cable Television Co. of Fla. v. White Development Corp., 902 F.2d 905, 910 (11th Cir. 1990)(quoting Centel Cable Television Co. of Fla. v. Admiral's Cove Assoc., Ltd., 835 F.2d 1359, 1363 n.7 (11th Cir. 1988)).

171 C/R TV, Inc. v. Shannondale, Inc., 27 F.3d 104, 109 (4th Cir. 1994).

172 Id. Moreover, to the extent that a clause allowing "reasonably necessary" use of the easement exists in an easement contract, the Ninth Circuit has held that "compliance with mandatory federal programs imposing legal obligations on [the utility] is 'reasonably necessary' to the installation of [additional facilities within the easement]." Pacific Gas Transmission Co. v. Richardson's Recreational Ranch, Ltd., 9 F.3d 1394, 1396 (9th Cir. 1993).

Some commenters argue that utilities possess only licenses or leases to enter MTEs to install their networks in rights-of-way and other locations, such as ducts and conduit.[173] As an initial matter, it should be noted that a right-of-way often accompanies a lease.[174] Thus, utilities may possess rights-of-way pursuant to a lease. More importantly, however, a utility should not be allowed to structure its private arrangements in a manner that permits only "exclusive" access by characterizing its access rights as a license or lease.[175] Property owners and managers admit that the ILECs have the right to access their buildings. The "Real Access Alliance" claims that "[i]f an ILEC has a license coupled with an interest, the owner cannot freely remove the ILEC from the premises nor change the terms of the ILEC's access rights."[176] The "Real Access Alliance" also asserts that "the ducts and conduits located inside buildings are most commonly

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173 See e.g., RAA Comments, at 55; USTA Comments, at 9. Some commenters claim that buildings owners, not the utilities, own ducts, conduits, and rights-of-way in MTEs. See Cincinnati Bell Comments, at 5; USTA Comments, at 3. However, the statute encompasses locations controlled as well as owned by utilities. See 47 U.S.C. § 224(f)(1). Moreover, the Commission has made clear that all rights to access property, even if unexercised, fall within Section 224. Local Competition First Report and Order, at ¶ 1181.

174 See, e.g., Neidlinger v. Cersosimo, No. 49121, 1990 WL 282629, at *19 (Conn. Super. Ct. Aug. 30, 1990)(stating that a right-of-way may be included in a lease, or implied from all the circumstances of the lease).

175 See AT&T Comments, at 20 n. 20 ("[U]tilities should not be permitted to circumvent their statutory obligations under section 224 by structuring their private arrangements to permit only 'exclusive access' to 'pole[s], duct[s], conduit[s], or right[s]-of-way.'"). AT&T also proposes that an "information requirement" be imposed, which would allow competing providers "to review any franchise, license, contract, lease, or other agreement the utility has entered into with a municipality, property owner, utility, or other right-of-way interest holder." Id. at 22. WinStar agrees.

176 RAA Comments, at 39 (emphasis added).

part of the fabric of the building and are neither owned nor controlled by the utilities that have the right to occupy them -- they are owned and controlled by the property owner."[177]

The access rights the "Real Access Alliance" describes are indistinguishable from a right-of-way: "[i]n general, a license coupled with a grant or interest is irrevocable as long as the interest continues. Where the authority reaches beyond mere permission, the right amounts to a grant or an easement, and where it is so construed, it takes the qualities of a right in the land itself."[178] Thus, if an ILEC wished to remove its wires, perform maintenance to its facilities, or install additional wires in the ducts or conduits of a building, the property owner would be unable to prevent the ILEC from performing these functions. Under the nondiscrimination requirement of Section 224, competitive carriers must have the same access rights. This also includes the right of telecommunications carriers to access roofs when the utilities' rights in the MTE would allow it, even if the utility currently is not engaged in such access.

3. Section 224 Includes Rights-Of-Way On A Utility's Own Property That It Uses To Distribute Its Services.

Section 224 grants telecommunications carriers access to rights-of-way located on a utility's own property, if used by the utility in the manner of a right-of-way as part of its distribution network. Some commenters erroneously assert that the Commission resolved this issue in the First Local Competition First Report and Order.[179] However, the Commission held only that utilities need not make space available on the roofs of their corporate offices.[180] It did

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177 Id. at 49 (emphasis added).

178 25 Am. Jur. 2d, Easements and Licenses § 144 (1996)(citations omitted).

179 SBC Comments, at 4; UTC/EEI Comments, at 12.

180 Local Competition First Report and Order, at ¶ 1185.

not reach the question of whether utilities must make space available on the roofs of MTEs in which they use such space in connection with their distribution network. Therefore, this issue is properly raised by the Commission in the Notice, and pursuant to the discussion above, utilities must make all of their rights-of-way available to telecommunications carriers. This, of course, includes even those areas owned by utilities which are used to provide their own services.[181]

C. Safety Concerns Should Not Preclude The Commission From Fully Implementing Section 224.

Several commenters argue that safety concerns preclude access in intra-MTE rights-of-way, such as ducts and conduit.[182] WinStar agrees that reasonable safety concerns will, and must be recognized. However, that does not merit confusing safety concerns with nondiscriminatory access provided to competitive carriers by Section 224 of the Act. In the Local Competition First Report and Order, the Commission recognized that "safe and reliable provision of utility services"

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181 Id. Some commenters assert that Section 224 does not cover locations on a utility's own property because the traditional, property law definition of term "right-of-way" is the right to use another's property. See Electric Utilities Coalition Comments, at 6-7. However, as discussed above, the Commission should not be constrained by state law definitions; rather, it must implement Section 224 in accordance with Congressional intent. Because Congress intended to permit access by utilities to all rights-of-way held by utilities, access to locations on a utility's own property used in the manner of a right-of-way should be included.

182 See RAA Comments, Declaration of Cathy L. Yovanov, at 3 (telecommunications installations would compromise the structural integrity of some buildings); id., Declaration of James Sylvester, at 5 (some buildings cannot accommodate modern telecommunications services); Cornerstone Properties et al. Comments, at 35 (use of existing rights-of-way by telecommunications carriers can cause safety problems in buildings, such as using up surplus electricity rights-of-way that will be needed to accommodate future power needs of tenants); Community Associations Institute et al. Comments, at 25 (use of existing space by telecommunications providers would likely result in poor quality installations and increased damage to common property); Electric Utilities Coalition Comments, at 8 (permitting access by telecommunications carriers would lead to negative consequences, such as current inductance, shock hazard, and interference).

is important to the public welfare, but "that the 1996 Act reinforces the vital role of telecommunications and cable services."[183] The Commission explicitly acknowledged that Section 224 reflects Congressional intent that utilities must be prepared to accommodate requests for access to rights-of-way and other locations by telecommunications carriers and cable operators.[184] Hence, these concerns should not prevent the Commission from taking the next step and fully implementing Section 224.

Moreover, in the Local Competition First Report and Order, the Commission stated that utilities may continue to rely on industry codes -- such as the NESC -- with respect to capacity, safety, reliability, and general engineering principles.[185] The Commission also stated that other standard codes would be presumed reasonable.[186] As discussed above, the NEC contains standards for installation of electrical and communications facilities in buildings.[187] Compliance with these standards will ensure that access is not disruptive to utility services or dangerous to the MTE, its tenants, or the utility's distribution network.[188] Thus, agreement by telecommunications

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183 Local Competition First Report and Order, at ¶ 1158.

184 See id.

185 See id. at ¶ 1151.

186 See id.

187 The NEC also refers to nationally recognized industry standards published by ANSI: (1) the Commercial Building Telecommunications Wiring Standard; (2) the Commercial Building Standard for Telecommunications Pathways and Spaces; and (3) the Residential and Light Commercial Telecommunications Wiring Standard.

188 BOMA itself has recognized that national standards are viable, in that it has sought to draft a national standard regarding fire safety. See Exhibit 4.

carriers to follow industry standards should be sufficient to dispel concerns about capacity, safety, reliability, and other engineering issues.[189]

Moreover, the Commission must be wary of utilities' objections based on safety concerns, as some comments contain statements that are exaggerated or fail to disclose that adequate safeguards are available. Several electric utilities allege that safety and engineering concerns mandate that communications wires and facilities must be kept separate from energized electric wires under the NEC.[190] Although the NEC states that communication wires and cables must be separated from other conductors, such as electric light or power circuits, it also states that these wires may share space if a barrier is used or they are encased in raceways.[191] Thus, by following standard industry practices, telecommunications providers installing communications networks in utility rights-of-way will not adversely affect the safety of MTE properties and tenants.

D. Section 224 Does Not Violate The Fifth Amendment Takings Clause.

Several commenters argue that Section 224 violates the Fifth Amendment because it is a taking and does not provide for just compensation to be paid to utilities. Moreover, several commenters requested that the Commission stay this proceeding until the U.S. Court of Appeals

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189 Moreover, utilities are themselves developing ways to utilize electrical wires to deliver a wide range of telecommunications. See "First Ever Power Line Telecom Report For North America," UTC Alert (Aug. 2, 1999)(reporting on the status of "technology for using existing electrical transmission and/or distribution wires to deliver voice, data, and/or video services"); Ross Kerber, "Utilities Reach Out To Add Phone, Cable Service," Wall St. J., at B1 (Jan. 27, 1997)(reporting that American Electric Power Co. "will soon carry telephone conversations over the wires that control its power lines"). Thus, utilities' objections appear to be overstated.

190 See American Electric Power Service et al., Comments, at 12-14; Florida Power & Light Co. Comments, at 13 n.19.

191 See National Electrical Code Handbook 859 (7th ed. 1996).

for the Eleventh Circuit determined whether Section 224 was a violation of the Fifth Amendment's Takings Clause.[192] This argument is now moot as the court has issued its decision.[193] The court determined that Section 224 is a takings; nevertheless, it held that Section 224 is constitutional because the statute provides the means for utilities to be paid just compensation.[194] Accordingly, the Commission should reject arguments that Section 224 violates the Fifth Amendment.

Commenters also argue that rights-of-way are not susceptible to the compensation offered by Section 224.[195] However, "the access and reasonable rate provisions of Section 224 apply where a . . . telecommunications carrier seeks to install facilities in a right-of-way but does not intend to make a physical attachment to any pole, duct, or conduit."[196] The fact that the pole attachment formula is not suitable for wireless attachments or installations in utility rights-of-way does not prevent utilities from receiving just compensation. The Commission has determined that it will resolve complaints concerning just, reasonable and nondiscriminatory pole attachments to a utility's right-of-way on a case-by-case basis.[197] Indeed, in Gulf Power Co. v. United States, the

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192 See, e.g., Electric Utilities Coalition Comments, at 5; UTC/EEI Comments, at 9. UTC/EEI also argues that the Commission may not adopt a new rulemaking when petitions for reconsideration concerning related issues are still pending. UTC/EEI, at 9; see also Florida Power & Light Co., at 25.

193 Gulf Power Co. v. United States, No. 98-2403, slip op. (11th Cir. Sept. 9, 1999).

194 Id. at 18.

195 See, e.g., RAA Comments, at 56.

196 Pole Attachments Report and Order, at ¶ 117.

197 Id. at ¶ 121. However, as demonstrated in the Petition for Reconsideration filed by Teligent on April 13, 1998 in CS Docket No. 97-151 (supported by the Comments of WinStar, filed May 2; 1998), Section 224 requires the FCC to govern in an affirmative manner the charges for access to rights-of-way.

utilities argued that the FCC's reasonable rate formula might prevent the FCC from awarding the utility the constitutionally required rate of just compensation.[198] Thus, the utilities should be more, not less confident, that a case-by-case approach will ensure them full compensation. To the extent that the FCC's determination of what is reasonable compensation does not satisfy a utility, it may challenge this determination in court.[199]

MTE owners argue that if third parties are allowed to occupy their property without their authorization, a takings without just compensation will occur, thereby violating the Fifth Amendment. However, for non-utility property owners, there would be no taking, as Section 224 contemplates access to existing rights-of-way held by utilities. As demonstrated above, there is no takings when additional occupation does not burden the underlying estate.[200] If, however, there is a takings, the non-utility property owner will be duly compensated. For example, if the utility must exercise its power of eminent domain to extend its right of access to accommodate a fixed wireless carrier, the property owner will be compensated.

Thus, the Commission must fully implement Section 224 by confirming that its benefits and protections apply to all telecommunications carriers, including wireless carriers. It must

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198 However, the court rejected this argument, stating that the issue was not ripe for decision. Gulf Power Co., No. 98-2403, slip op. at 25. In addition, the court noted that if Commission failed to provide just compensation, a utility could appeal the Commission's rate order directly to a federal appeals court. Id. at 26.

199 See 47 U.S.C. § 402(a)(providing generally for appeals from FCC orders); Gulf Power Co. v. U.S., No. 98-2403, slip op. at 18.

200 See Salvaty v. Falcon Cable Television, 165 Cal. App. 3d 798, 803 (Ct. App. Ca. 1985)(holding that the installation of cable television equipment to an easement originally granted by a private party for use by a utility does not materially increase the burden on the property); Hoffman v. Capitol Cablevision Sys., Inc., 383 N.Y.S.2d 674, 677 (N.Y. App. Div. 1976)(holding that easements retained by power and telephone utilities may be apportioned under state law to permit use by a cable company without payment of compensation to the underlying property owner).

adopt an expansive definition of "rights-of-way" under Section 224 to ensure that telecommunications providers have access to utilities' rights-of-way on both private and public property. It must not be constrained by state property law interpretations of the terms of Section 224. Moreover, concerns for safety should not prevent the Commission from fully implementing Section 224 because there are industry standards for installations by telecommunications carriers in MTEs. Similarly, the Commission should not be discouraged by utilities' and building owners' claims that takings of private property will occur; to the extent that there is a takings, the compensation mechanism of Section 224 will provide just compensation.

VII. THE COMMISSION SHOULD REQUIRE THAT THE DEMARCATION POINT BE LOCATED AT THE MINIMUM POINT OF ENTRY IN ALL MTEs.

Where the demarcation point is located at the MPOE and the Commission holds that MTE owners and managers must provide access on a nondiscriminatory basis, the ILEC and competitive carriers enter the MTE on an equal basis. Such an approach is both technically and practically feasible, as demonstrated by those states that already require ILECs to locate the demarcation point at the MPOE in MTEs.[201] However, when the demarcation point is not located at the MPOE, the ILEC, and not the building owner, owns the wire connecting to the consumer's premises. CLECs must either build their own wire to the consumer or lease these facilities from the ILEC to the consumer. Ideally, WinStar would prefer to install its own wiring to reach consumers in MTEs. However, the cost and complexity of rewiring existing buildings can add thousands of dollars to the cost of serving just one tenant in a building and, therefore, can significantly delay -- or even prevent -- the introduction of competitive services to an MTE.

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201 See WinStar Comments, at 67-68.

Unlike ILECs, who typically perform such installations during building construction for every floor and traditionally have been given free access to such wiring thereafter, competitors must expend significant amounts of time and money in order to install their wiring. Moreover, typically MTE owners and managers prevent CLECs from rewiring a building due to disruption and aesthetics issues. However, if competitors can access intra-building wire at the MPOE, CLECs can offer tenants competitive service with only the MTE owner's permission. Rather than being forced to rewire the building or to depend on the ILEC's network, competitors are placed on an equal footing vis-à-vis the ILEC. Thus, the Commission should modify its rules in Part 68 and require the ILEC to relocate the demarcation point in MTEs to the MPOE.

The comments on this issue are conflicting among MTE owners and ILECs. "The Real Access Alliance" notes that if the demarcation point is at the MPOE, requests for access to wire a building would be minimized.[202] Nevertheless, it does not want the imposition of an MPOE rule because it would like to have flexibility for the demarcation point. Cornerstone Properties et al. argues that MTE owners should have the right to request the demarcation point at the MPOE without encountering delays, terms, fees or other roadblocks by the ILECs.[203] It also states that the demarcation rules should apply to all TSPs. The ILECs argue, inter alia, that the imposition of the demarcation point at the MPOE would involve significant costs, raises questions of access and maintenance, and should be at the discretion of the MTE owner.[204] USTA asserts that this issue should be addressed in a comprehensive docket addressing all types of inside wire.[205]

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202 RAA Comments, at 59.

203 Cornerstone Properties et al. Comments, at 39.

204 Ameritech Comments, at 8-9.

205 USTA Comments, at 13.

GTE, on the other hand, proposes that the Commission require the demarcation point at the MPOE for all MTEs that existed as of August 13, 1990, and for buildings constructed prior to that date when requested by the owner, customer, or competitive carrier (with the MTE owner's permission).[206] GTE asserts that the requesting entity should be responsible for the costs incurred due to the move of the demarcation point to the MPOE.[207] Moreover, the existing carrier should be compensated at structural costs or through an "allowed use" option which would retain the capital portion of the inside wiring in the carrier's rate base until fully depreciated. Under the "allowed use" option, the existing carrier will retain ownership of the installed wiring and the continuing ability to serve tenants, but control of the use of the wire on the property owner's side of the demarcation point would revert to the property owner. GTE asserts that whoever owns and/or controls the inside wiring in an MTU should be free to set a reasonable price for its use.[208] GTE concludes that the Commission should allow private negotiations to determine the compensation amount.[209]

Commenters in this proceeding have demonstrated the need for a uniform policy regarding MPOEs through a modification to the Commission's rules governing demarcation points in MTEs. As stated by MTE owners, relocating the demarcation point at the MPOE will decrease the amount of installation and access needed in MTE properties.[210] It will provide CLECs easier access to tenants without CLECs' incurring the costs to rewire the building themselves or relying

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206 GTE Comments, at 7-8.

207 Id. at 12.

208 Id. at 13.

209 Id.

210 See, e.g., RAA Comments, at 59.

upon the ILEC's network. Even GTE agrees that the relocation of the demarcation point to the MPOE should be required in all buildings wired after August 13, 1990.[211] Moreover, it asserts that ILECs should relocate the demarcation point to the MPOE at the request of the MTE owner, a tenant, or a CLEC.[212] WinStar agrees. However, contrary to GTE's suggestion, such requests should be accommodated whether or not the MTE owner consents.[213] In addition, the ILECs should not unreasonably delay the relocation of the demarcation point.[214]

The MTE owner should reimburse the ILEC for the costs to relocate the demarcation point whether or not it is the requesting party. This is reasonable because the MTE owner becomes the owner of the intra-MTE wiring once the demarcation point is moved to the MPOE. Accordingly, the MTE owner, not the ILEC, will control access to the intra-MTE wiring. MTE owners must then provide access to the intra-MTE wiring on a nondiscriminatory basis to all telecommunications carriers who request it.[215] Any access fees charged by the MTE owner must be nondiscriminatory. Through their access fees, however, MTE owners will be able to recoup the costs incurred due to the relocation of the demarcation point from all telecommunications carriers, including the ILEC.

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211 See GTE Comments, at 7-8.

212 Id.

213 Just as MTE owners can extract monopoly rents from CLECs to access their properties, they could exert their monopoly position if they must grant authority for the demarcation point to be relocated to the MPOE.

214 See Cornerstone Properties et al. Comments, at 32.

215 Cornerstone Properties et al. claims that a nondiscriminatory access requirement is inconsistent with MTE owners' requests to relocate the demarcation point. Cornerstone Properties et al. Comments, at 25. However, this is not the case. With the relocation of the demarcation point at the MPOE and the MTE owner gaining ownership and control of the intra-MTE wiring, a nondiscriminatory requirement will ensure that all CLECs that want to serve tenants in an MTE can reach them on an equal basis.

As demonstrated by the comments of CLECs and GTE in this proceeding, the Commission must reject the comments raised by other ILEC commenters and modify the Commission's rules to require the relocation of the demarcation point to the MPOE in all MTEs wired after August 13, 1990 and for all other MTEs upon the request of the MTE owner, a tenant, or a CLEC.

VIII. THE COMMISSION SHOULD IDENTIFY INTRA-MTE WIRE AS AN UNBUNDLED ELEMENT.

WinStar submitted Comments and Reply Comments in response to the Second Further Notice of Proposed Rulemaking in CC Docket Nos. 96-98 and 95-185 (the "UNE Remand proceeding") requesting the Commission to unbundle, inter alia, intra-MTE wiring and network interface devices ("NIDs") in MTEs. WinStar reiterated its position in its Comments in this proceeding.[216] On September 15, 1999, the Commission adopted an Order in the UNE Remand proceeding. While the Commission has yet to release the UNE Remand Order, the Commission's Press Release contained a summary of those network elements that must be unbundled by the ILECs. The summary states "[i]ncumbent local exchange carriers . . . must offer unbundled access to loops, including high-capacity lines, xDSL-capable loops, dark fiber, and inside wire owned by the incumbent LEC." Moreover, the summary states "[i]ncumbent LECs must offer unbundled access to subloops, or portions of the loop, at any accessible point. Such points include, for example, . . . the network interface device . . . ." WinStar is encouraged by the summary of the UNE Remand Order; nevertheless, without the opportunity to review the Order,

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216 WinStar Comments, at 68-70. Bell Atlantic submits in its Comments that it provides access to intra-building wire in its region. Bell Atlantic Comments, at 2. It is WinStar's experience that this assertion is not accurate; however, if it is correct, WinStar invites Bell Atlantic to advise competitive carriers regarding its process for permitting competitive access to intra-building wire in its region.

it is compelled to offer a reply to the Comments submitted in this proceeding concerning the unbundling of intra-MTE wiring.

As discussed above, MTE owners typically prefer CLECs to use existing wire in the MTE.[217] However, if the ILECs' demarcation point is not at the MPOE, CLECs must interconnect with the ILECs' intra-MTE wiring to serve their customers. Those CLECs whose networks extend to MTEs only need access to a small, but important portion of the network -- the wiring from the entrance of the MTE to the demarcation point. CLECs should not be required to lease an entire loop from the ILEC, just to access a portion of the loop.[218] Thus, the Commission should require that ILECs unbundle their loops and offer subloops to CLECs, including intra-MTE wiring.

ILECs argue that the "necessary" and "impair" standards of Section 251 have not been met for the Commission to unbundle intra-MTE wiring.[219] They claim that there are many alternate sources for building cable and wire, including the ability to obtain the entire loop from the ILEC on an unbundled basis.[220] Others argue that subloop unbundling at the NID is not physically possible for some loops, and it would require a substantial redesign of cross-connect

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217 Cornerstone Properties et al. argues that building owners should be able to insist that CLECs use UNEs. Cornerstone Properties et al. Comments, at 26. The Commission should reject this proposal because there may be instances when the ILECs' network is inadequate. Moreover, the Commission should reject this proposal if it would mean that fixed wireless providers would not be able to use their technology to offer their services..

218 The Texas Office of Public Utility Counsel supports the unbundling of intra-MTE wiring. Texas Office of Public Utility Counsel Comments, at 4.

219 See Ameritech Comments, at 4-5.

220 See, e.g., Cincinnati Bell Comments, at 10.

cabinets in order to accommodate additional termination blocks which would raise the price of subloop elements to prohibitively high levels.[221]

Section 251(d)(2)(A) invokes the question whether an element is "necessary" only with respect to "such network elements as are proprietary in nature." MTE wiring is not proprietary. Typically, MTE wiring is basic wiring with a minimum amount of connecting equipment such as splitters. No proprietary protocols or elements containing proprietary information are involved. The Commission must reject the claims that the "necessary" standard has not been met.

Whether MTE wiring should be unbundled turns on whether the ILECs' failure to provide access to such wiring would "impair" the ability of CLECs to provide their services. A CLEC's ability to provide its proposed services is impaired if its ability to provide service without a particular network element is materially diminished. A CLEC's ability to provide services is materially diminished if an ILEC's denial of access to an element, given the availability of the element outside the ILEC's network, either hinders the prompt availability of service to any class of customers, increases the cost of service, or gives the incumbent some other significant competitive advantage.

The cost of overbuilding existing MTE wiring is prohibitive as a practical business matter. As referenced above, it is usually the refusal of a building owner or manager to permit overbuilding that raises the barrier for CLECs. They typically refuse to permit overbuilding because of the potential disruption caused by the construction and the attendant risk to the building's aesthetics. Moreover, there is no reasonable substitute for the existing intra-MTE wiring. As such, ILECs' refusal to allow WinStar to use existing intra-MTE wiring significantly

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221 See USTA Comments, at 14-15; Ameritech Comments, at 7; GTE Comments at 20-21.

hinders and delays WinStar's delivery of service and provides the ILEC with a further competitive advantage. There can be no doubt that MTE wiring, which is the direct connection to end-user customers over the "last 100 feet" of the network, is essential to competition. Thus, the Commission should reject the ILEC claims that the "impair" standard has not been met.

Unbundled access to riser cable and wiring within MTEs is technically feasible. ILECs already make their intra-building wiring available as a UNE to competitive carriers in several states, including Florida, Georgia, Kentucky, Nebraska, New York, Oregon, and Tennessee. The Commission must reject claims that subloop unbundling in MTEs is not technically feasible. Accordingly, the Commission must place the burden on the ILEC to demonstrate that it is not technically feasible to unbundle intra-MTE wiring.

IX. THE COMMISSION MUST EXPAND THE SCOPE OF SECTION 1.4000 OF ITS RULES TO ENCOMPASS ALL FIXED WIRELESS ANTENNAS.

Upon achieving access to consumers in MTEs, fixed wireless carriers must not be prevented from placing their antennas on rooftops by local zoning or home owner association restrictions. It is particularly important that fixed wireless carriers receive the same protection as those carriers whose devices are covered by Section 1.4000 of the Commission's rules because of the convergence of communications systems. For example, LMDS providers, which are currently covered by Section 1.4000, will be able to provide services that compete with fixed wireless carriers that do not offer "video programming" and thus are not protected by Section 1.4000. The Commission must level the playing field so that all fixed wireless carriers receive the same protection from Section 1.4000.[222]

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222 It is important to note that the modification of Section 1.4000 alone will not provide fixed wireless carriers a complete solution. Fixed wireless carriers must also obtain access to MTEs.

However, Commenters claim that the Commission does not have the authority to expand Section 1.4000 to include all wireless antennas.[223] Commenters allege that the Commission needs statutory authority like Section 207, yet they claim that Section 207 is limited only to those antennas specifically named.[224] As demonstrated above, the Commission has broad authority under Titles I, II, and III of the Communications Act to implement rules in order to promote competition as intended by the 1996 Act. A Commission limitation on state and local restrictions of fixed wireless antennas is within its broad authority to regulate "all instrumentalities"[225] of radio communication so as to make available to all people of the U.S. a "rapid, efficient, Nation-wide, and world-wide wire and radio communication service . . . ."[226] In addition, Section 303(r), which grants the Commission broad authority to regulate the provision of radio services, permits the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of this Act, ..."[227] These Sections alone grant the Commission the necessary authority to restrict state and local prohibitions on fixed wireless antennas. In fact, before Congress enacted Section 207, the Commission adopted a rule that preempted certain types of non-federal regulation of satellite antennas.[228] Thus, the

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223 See, e.g., Community Associations Institute et al. Comments, at 37.

224 Id.

225 47 U.S.C. § 153(33).

226 Id. § 151.

227 Id. § 303(r).

228 See AT&T Comments, at 40-41 (explaining that the Commission adopted Section 25.104 of its rules to govern restrictions on the installation, maintenance, and use of satellite earth station antennas greater than one meter in diameter in order to protect the federal interest in assuring access to interstate satellite-delivered signals).

Commission has adequate authority to preempt all fixed wireless antennas without specific Congressional mandate.

Nevertheless, Section 207 of the 1996 Act provides the Commission with a principled basis for the exercise of ancillary jurisdiction to limit state and local restrictions on fixed wireless antennas. Section 207 recognizes the need to promote competition in the MVPD market by restricting state and local prohibitions on certain antennas which provide video programming. It is reasonably ancillary for the Commission to promote full competition between those carriers providing fixed wireless services and those carriers providing both video programming and fixed wireless services by extending the protection of Section 1.4000 to cover all types of fixed wireless antennas. In fact, the Commission already extended the coverage of Section 207 to antennas not specifically listed in the statute.[229]

Contrary to the National Association of Counties' Comments, a Commission prohibition on state and local restrictions of fixed wireless antennas would be consistent with Section 332(c)(7) of the Communications Act.[230] Section 332(c)(7)(B)(i)(II) provides that:

> The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof -- shall not prohibit or have the effect of prohibiting the provision of personal wireless services.[231]

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229 See OTARD Order, at ¶ 30. The Commission took an expansive view of the types of video programming service providers intended to be protected by Section 207 and included video service providers not specifically delineated in Section 207, such as LMDS licensees. Id.; but see Community Associations Institute et al. Comments, at 38 (claiming that Congress only intended Section 207 to preempt restrictions on the three types of antennas listed in the statute.)

230 National Association of Counties Comments, at 21.

231 47 U.S.C. § 332(c)(7)(B)(i)(II).

If a state or local restriction prohibits the placement of a fixed wireless antenna on a particular building, the fixed wireless carrier cannot provide service to consumers in that building using its fixed wireless technology. This has the effect of prohibiting the provision of personal wireless services.[232] Fixed wireless carriers must place their antennas on the rooftops of buildings to serve customers in those buildings. Unlike mobile wireless service providers that may have alternatives for antenna placement should a state or local government restrict access to certain properties, fixed wireless carriers do not have alternatives. They are foreclosed from serving consumers where local restrictions prohibit them from placing antennas on the rooftop of those buildings where the consumers are located. It is clear from Section 332(c)(7) that state and local restrictions which prohibit personal wireless services are not permitted. Hence, the Commission has the authority to extend Section 1.4000 to protect all fixed wireless carriers from state and local restrictions, and such an extension is not contrary to, and indeed is consistent with Section 332(c)(7).

X. CONCLUSION

For the foregoing reasons, the Commission should (1) adopt a nondiscriminatory access provision to multi-tenant environments for telecommunications providers; (2) fully implement Section 224 of the Communications Act and permit telecommunications providers to use utilities' rights-of-way and conduit over private, as well as public property; (3) modify its Part 68 rules and require that the demarcation point be located at the minimum point of entry in all multi-tenant environments at the request of the MTE owner, a tenant, or a competitive carrier; (4) designate intra-building wire as an unbundled network element; (5) grant the Joint Petition regarding the

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232 See also AT&T Comments, at 41.

Commission's Second Report and Order in the over-the-air reception device proceeding; and (6) modify Section 1.4000 of its rules to include all fixed wireless devices.

Respectfully submitted,

WINSTAR COMMUNICATIONS, INC.

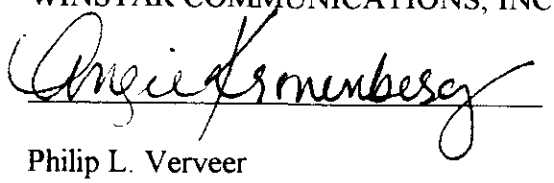
By: 

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EXHIBIT 1